with on a showing of unavailability, by not even requiring that such a showing be first made. But it is eminently proper where there are a number of salesmen, teamsters and clerks making reports and several bookkeepers entering them, that the man who is in charge of all these activities and who knows that the books are regularly and correctly kept should be competent to so testify and enable the books to be received as evidence, particularly if a showing of inconvenience is made.

J. G.

MINING LAW: EXTRALATERAL RIGHTS ON VEIN POSSESSING CHARACTERISTICS OF ANTICLINAL FOLD OR ROLL.—An interesting question raised by the case of *Jim Butler-Tonopah Mining Company v. West End Consolidated Mining Company*,[1] is whether extralateral rights can be exercised in two opposite directions on a vein possessing the characteristics of an anticlinal fold or roll. That is, when the vein can be followed up on its dip to a crest or axis of the roll or fold and then turns over and dips down in an opposite direction, does this crest or axis of the roll constitute an apex? On this point there has been no positive adjudication. There are cases[2] holding that where there is a swell or wave or roll in a vein this does not constitute an apex. The vein in question was in the form of an anticlinal roll or fold. Heretofore, a terminal edge has been considered by the cases and authorities as an essential element of a legal apex.[3] One of the approved definitions says that a legal apex is "All that portion of a terminal edge of a vein from which the vein has extension downward in the direction of the dip."[4] The court in the Jim Butler-West End case decided that a terminal edge was not an essential element of a legal apex, saying that when the vein turns over and dips in an opposite direction, that the crest of the fold is the legal apex and that an extralateral right can be exercised in both directions on the opposite dipping limbs of the anticlinal vein. The decision is also noteworthy for the fact that this is the first time that the statute has been construed so as to award an extralateral right in two opposite directions. An examination of the mining laws of other countries where the extralateral right has been sanctioned in one form or another does not disclose any intimation that this right has ever been exercised on the same vein in two opposite directions.

[1] (July 3, 1916), 158 Pac. 876.

[2] Illinois Silver M. Co. v. Raff (1893), 7 N. M. 336, 34 Pac. 544; Iron Silver Mining Co. v. Murphy (1880), 3 Fed. 368, 375-76; Stevens v. Williams (1879), Fed. Cas. No. 13,414.

[3] Costigan on Mining Law, 139-40; Barringer & Adams, The Law of Mines and Mining, p. 442; Duggon v. Davey (1886), 4 N. Dak. 110, 26 N. W. 887; Alameda M. Co. v. Success M. Co. (Dec. 29, 1916), 161 Pac. 862.

[4] Lindley on Mines, p. 687; definition approved in Stewart M. Co. v. Ontario M. Co. (1914), 237 U. S. 350, 35 Sup. Ct. Rep. 610, 614, 59 L. Ed. 989.

It is doubtful if the framers of the federal mining act had this situation in mind. It will be interesting to see whether the decision of the Supreme Court of Nevada will meet with the approval of the Supreme Court of the United States.[5]

S. F. H.

MORTGAGES: BAR OF THE STATUTE OF LIMITATIONS AS GROUND FOR QUIETING TITLE.—With the decision in *Bulson v. Moffatt*[1] it becomes evident that a mortgagor in California cannot under any circumstances quiet his title against an outstanding outlawed mortgage without first tendering the amount of the mortgage debt. In this case the mortgagor was denied relief though the mortgage was not only unenforceable because barred by the statute of limitations but also because it was invalid and illegal, having been so declared in a foreclosure proceeding which had terminated unsuccessfully more than twenty years prior to the bringing of this action.

The court based its decision in the main on the rule now firmly established in California that the statute of limitations gives only defensive rights, and cannot be relied upon for affirmative relief, except, perhaps, where it is invoked to prevent the exercise of a power of sale contained in an outlawed mortgage.[2] Thus the mortgagor even after the statutory time has elapsed cannot eject a mortgagee who has taken possession with his consent, or under color of law, while the mortgage was subsisting, without first tendering the amount of the mortgage debt.[3] Nor, as stated above, can he quiet title against an outstanding mortgage;[4] though it is to be noted that if in such action the mortgagee is so ill advised as to cross complain for a foreclosure he has by his own unsuc-

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[5] The case has gone to the U. S. Supreme Court on writ of error.

[1] (November 23, 1916), 52 Cal. Dec. 565, 161 Pac. 259.

[2] Goldwater v. Hibernia Sav. & Loan Soc. (1912), 19 Cal. App. 511, 127 Pac. 861. Contra, Mentzel v. Hinton (1903), 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647, and note, 648. See also 6 L. R. A. (N S.) 510. Such power is not of course barred in a trust deed. Grant v. Burr (1880), 54 Cal. 298.

[3] Frink v. Le Roy (1874), 49 Cal. 314; Spect v. Spect (1891), 88 Cal. 437, 26 Pac. 202, 13 L. R. A. 137, 22 Am. St. Rep. 314; Hooper v. Young (1903), 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Burns v. Hiatt (1906), 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157. See Cameron v. Ah Quong (1908), 8 Cal. App. 310, 96 Pac. 1025. Similarly a pledgee cannot be deprived of his possession of the pledge without a payment of the debt even though the statute has run. Puckhaber v. Henry (1907), 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, overruling Mutual Life Ins. Co. v. Pacific Fruit Co. (1904), 142 Cal. 477, 76 Pac. 67.

[4] Booth v. Hoskins (1888), 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena (1889), 80 Cal. 132, 22 Pac. 74; Hall v. Arnott (1889), 80 Cal. 348, 22 Pac. 200; Brandt v. Thompson (1891), 91 Cal. 458, 27 Pac. 763; Boyce v. Fisk (1895), 110 Cal. 107, 42 Pac. 473. See Raggio v. Palmtag (1909), 155 Cal. 797, 103 Pac. 312. See also, 6 L. R. A. (N. S.) 516; L. R. A. 1916 B 1220.